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NO. 943

IN THE

Supreme Court of the United States

October Term 1964

LEROY COOKS, ET AL., *Petitioners*

v.

BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, LOCAL NO. 991 AND LOCAL NO. 783 AND THE TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Respondents*

PETITION FOR WRIT OF CERTIORARI

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BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, LOCAL NO. 991 AND LOCAL NO. 783 AND THE TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Respondents*

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case in December.

CITATIONS TO OPINIONS BELOW

The Judgment of the United States District Court for the Southern District of Texas is unreported and is printed in the accompanying Record Certified by the Clerk of the U. S. Court of Appeals Fifth Circuit (R. p. 396). The

Per Curiam opinion of the Circuit Court of Appeals, Fifth Circuit, is in the certified copy of the record (R. p. 433) and is officially reported at 338 F.2d 59 (1964).

JURISDICTION

Judgment of the Circuit Court of Appeals, Fifth Circuit, affirming the judgment of the District Court, Southern District of Texas, was rendered October 19, 1964. Rehearing was denied December 4, 1964 (R. p. 439). The Jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

What facts prove racial discrimination: Whether the facts as proved by Defendants, indicating that No Negro employees were upgraded according to the terms of a memorandum of Agreement between the Defendants Union and Company, for a period of 12 years, though white employees were consistently upgraded during the same period of time is proof of racial discrimination?

Whether in the face of the Company attitude toward upgrading Negroes as exemplified by and communicated to Plaintiffs through its authorized agent, Plaintiffs were required to do more, and prove more, in order to prove racial discrimination in upgrading?

Whether the fact of racial discrimination is proved by the continued failure of the union, after knowledge of the attitude of the company against upgrading Negro employees, to take positive steps to insure upgrading of Negro employees for a period of 12 years, amounted to proof of racial discrimination as condemned by the National Railway Labor Act?

CONSTITUTION OF THE UNITED STATES, AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Statutes involved are as follows:

28 U.S.C.A. 1254(1) Courts of Appeals; certiorari; appeal; certified questions.

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods.

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

45 U.S.C.A. 152 (Fourth). Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. 42. U.S.C.A. 1981. Equal Rights Under the Law. All persons within the jurisdiction of the United States shall have the same right in every state and territory

to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT OF THE CASE

Plaintiffs are Negro employees of the Defendant Texas and New Orleans Railroad Company, hereinafter sometimes referred to as T & N O, who filed their petition in the United States District Court for the Southern District of Texas, Houston Division, against said T & N O, and Defendants Local No. 991 and Local No. 783 (R. p. 15) of the Brotherhood of Railway Carmen of America, and the Brotherhood of Railway Carmen of America, alleging in their complaint certain acts of racial discrimination on the part of Defendants in denying to them certain promotional or "upgrading" rights as shall hereinafter appear. The gravamen of the complaint is and the facts proved show that on February 4, 1943 Defendants negotiated a collective bargaining agreement, which they designated a Memorandum of Agreement, effective March 1, 1943, and provided a means whereby employees of the carmen-helper classification could for a period of time be "set-up" temporarily to the classification of car inspector, or carman or mechanic as the job is referred to alternately. The agreement also contemplated that after the employee had accrued the required number of hours as a temporary carman he would then be placed by the company on the permanent roster of carmen. The period of time crucial to this lawsuit is the period from 1943, when the aforesaid Memorandum of Agreement was negotiated and the year

1955, when the first Negro of Carmen helper classification in the terminal was promoted. That is, Plaintiffs' complaint reduces itself, in part, to complaining that none of them who were employed by the Defendant Railroad at its Houston Terminal as carmen-helpers were "set-up", or upgraded under such Memorandum of Agreement of 1943 until 1955, solely and because they were members of the Negro race; though, they have alleged and proved, during the same period, white employees in the Houston Terminal, of the classification of Carmen-helper *were* upgraded to carman or car inspector or mechanics. This racially discriminatory policy on the part of the company and the union, of setting up only white employees during the period aforesaid (a fact, as the evidence proved, accomplished with the cooperative efforts of the Brotherhood and T & N O) resulted in many white employees gaining permanent carman seniority before plaintiffs, though their initial hiring date was prior to the initial hiring date of many white employees. Plaintiffs in their attempts at availing themselves of the opportunities of employment advancement offered by the Memorandum of Agreement, after becoming aware that they were being systematically and continually being passed over in the upgrading practice, went both to the local chairman of their colored segregated local union and to the T & N O through the division car foreman. From neither source did Plaintiffs get satisfaction of their demands. Plaintiffs were only upgraded in the year 1955 when a sudden and unusual demand for carmen, produced by some changes in T & N O's operations, necessitated the filling of the demand for carmen from a source (negroes) not theretofore used at the Houston Terminal.

As a companion allegation, Plaintiffs averred defendants concealed the nature of said Memorandum Agreement from them and failed in their statutory duty in this regard.

For these acts of racial discrimination the Plaintiffs ask declaratory relief, and relief by way of damages and permanent injunction. After the case was called for trial the Court, pursuant to appropriate stipulation of the parties, entered its order severing the issue of racial discrimination vel non from all other issues arising under the pleadings, and pursuant to said order and stipulation the parties went to trial on the issue so severed (R. p. 426). Trial was had to the Court without the intervention of a jury. The Court subsequently made findings of fact and conclusions of law upon which judgment was entered favorable to Defendants. Jurisdiction of the U.S. District Court was based on 28 U.S.C.A. 1331 and 28 U.S.C.A. 2201, being a case arising under the constitution laws and treaties of, the United States where the amount in controversy exceeds $10,000, and praying for declaratory relief.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by the U. S. Supreme Court. This is so because the Circuit Court of Appeals has decided that the evidence adduced by Plaintiffs at the trial in the District Court was not sufficient to establish racial discrimination in upgrading procedures practiced by the Defendants union and Railroad, and that the findings made by the said trial court of no racial discrimination, against Plaintiffs, are supported by the sufficient evidence. Thus the important

question of federal law is, what evidence is sufficient to establish racial discrimination in upgrading practices adhered to by a union and railroad, under a complaint charging breach of duty to represent fairly and impartially under the National Railway Labor Act? — Stated another way, when should a finding of no racial discrimination, made by a District Court, be set aside as not supported by the evidence, in a case charging racial discrimination in upgrading practices?

A determination of this important question of federal law is necessary for the proper administration of the National Railway Labor Act. No guidelines have been set previously by this Court.

This Court first determined in *Steele v. Louisville and Nashville Railroad Company*, 325 U.S. 192 (1944) that in virtue of 45 U.S.C.A. 152 (fourth), which gives exclusive bargaining authority to the representative selected by a majority of the Craft, the representative so selected had a duty to represent all, including the minority, members of the class, and to refrain from discriminating against said minority members as well as protect them (the minority) from discrimination.

This Court indicated in *Conley v. Gibson;* 355 U.S. 41 (1957), that the federal district Court's jurisdiction had been properly invoked by Negro Employees who sued their local Union for breach of its statutory duty toward them by not protecting them against threatened discharge (a number of Negro employees of their craft had been discharged), while no white employees had been discharged.

These cases prescribe the duty of the union, as well as the liability of the carrier, and in so doing they determine,

for the most part, that minority employees' charges of racial discrimination are matters within the jurisdiction of the federal district courts.

Though there is little indication from authorities decided by the Court relative to evidence sufficient to establish racial discrimination in upgrading, the Conley Case does establish some discernable criteria. There the Court said:

> ". . . Here the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit. This Court squarely held in Steele and subsequent cases that discrimination in representation because of race is prohibited by the Railway Labor Act. The bargaining representative's duty not to draw 'irrelevant and invidious' distinctions among those it represents does not come to an abrupt end, as the respondents seem to contend, with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. A contract may be fair and impartial on its face yet administered in such a way, with the active or *tacit* consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit."

In the case at bar the allegations are in all things similar: that the Railroad refused wrongfully to upgrade Negro Employees (R. p. 295); that the union refused them protection in this upgrading and refused to help them with processing grievances (R. p. 29); that the white employees were upgraded according to the terms of the agreement. Proof of these allegations, this Court said in *Conley*, Supra, establishes a manifest breach of the Union's Statutory duty. The record shows how, over the alleged number of 12 years, the company wrongfully, refused to upgrade Plaintiffs (R. pp. 28, 93, 191, 192) and there is scarcely a shred of evidence to the contrary. The record shows abundant evidence of the refusal of the union to process the grievances of these Negro emplovees (R. pp. 28, 29, 32, 94, 95, 96, 150, 151, 152, 153, 154) and for no other fathomable reason save the fact that they were negroes. For if in fact it had been for reasons of lack of qualifications, defendants had every opportunity to make that fact abundantly clear in the record. They did not. Negro Plaintiffs were disqualified by their race long before the opportunity to qualify for performance in the jobs was offered them. No issue is made by the Defendants that no white employees were upgraded under this agreement during this twelve year period. If as this Court has said, collective bargaining is a continuing process, involving day-to-day adjustments, and the protection of employee rights already secured by contract, then the failure of the defendant union in this respect is amply demonstrated from the record. The right secured by contract was the right to be upgraded under the memorandum of agreement of 1943.

The Equal Protection Due Plaintiffs:

The concept of equal protection of the laws is essentially the fountainhead of constitutional American government.

Clearly enjoined against the state governments by the 14th Amendment, it has no less a clear and unimpeachable status as a fundamental right guaranteed by the federal government. To this end Congress early *enacted* legislation.* In the *Steele* case, Supra, this Court recognized the fact that Plaintiffs were entitled, at the hands of the union, to equal protection of the laws: "We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."

Boling v. Sharpe, 347 U.S. 497 (1954) establishes these propositions: That while due process of law under the 5th amendment and equal protection of the laws under the 14th are not synonymous they are not mutually exclusive; that equal protection is the more "explicit safeguard; that both may enjoin the same kind of unjustifiable discrimination (as in segregation in public education); liberty means not only "freedom from bodily restraint but "the full range of conduct which the individual is free to pursue." Hence, the logic of Plaintiffs' contention is unassailable, that if the 14th Amendment prevents the racially discriminatory practice of systematically excluding Negroes from juries, the 5th amendment prevents the union from engaging in like racially discriminatory activity, the systematic exclusion of Negroes from participating in the upgrading

*42 U.S.C.A. 1981 "All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws . . . for the security of persons and property as is enjoyed by white citizens. . ."

procedure provided for all employees by agreement between the railroad and union. Indeed, Mr. Justice Murphy in a concurring opinion in the *Steele* Case, Supra said "I am willing to read the statute as not permitting or allowing any action by the bargaining representative in the exercise of its delegated powers which would violate the constitutional rights of individuals.

The question can best be presented therefore in illuminating detail by examining that line of cases dealing with equal protection of the laws in fact situations where proof of racial discrimination is most analogous to racial discrimination in employment relations.

Equal protection of the laws has been more fully developed under the 14th amendment as a protection against state action. This being true, an examination of the implementation of the safeguard in these cases can best shed light here. What, therefore, proved to be racial discrimination and a denial of equal protection in those cases will illustrate that the practices carried on by union and railroad as proved by Plaintiffs in this case are also racial discrimination. The cases which offer the clearest analogy are those dealing with discrimination in the selection of juries.

Racial discrimination in employment, it is believed, cannot be looked at as an isolated phenomenon when trying to determine by what items of evidence a Plaintiff must establish racial discrimination. The cases dealing with Jury Discrimination offer great illumination. In *Smith v. Texas*, 311 U.S. 128 (194) the defendant Negro raised the issue of denial of the equal protection of the laws in a suit in which he was indicted for rape, alleging syste-

matic exclusion of members of this race from the grand-jury. The proof of racial discrimination was as follows: from 1931 through 1938 of 384 grand jurors who served in Harris County, Texas only 5 were Negroes; that when any of the names of negroes were on a 16 man jury list, the name of the negro was last, with the names of the first 12 being chosen. The Court found the record amply supported racial discrimination despite protestations by the commissioners that none was intended or practiced. This Court said:

> "Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service."

and further:

> "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand."

Again in *Cassell v. Texas,* 339 U.S. 282 (1950), this Court, "Since the result reached may deny a federal right. Re-examin[ed] the facts to determine whether petitioner . . . sustained by proof his allegation of discrimination." Plaintiff contended that Dallas County grand-jury commissioners for 21 consecutive lists had consistently limited Negroes selected to grand-jury service to not more than one on each grand jury. In short, such proportional representation of races on juries was condemned. "The constitution requires only a fair jury selected without regard to race." Under the Texas statutes certain qualifications exist for jury service just as defendants contended is the case with re-

spect to upgrading of negro employees in the instant case. Commissioners testified they knew no available Negroes, for the period specified, who qualified. Of this the Court said:

> "An individual's qualifications for grand jury service, however, are not hard to ascertain, and with no evidence to the contrary, we must assume that a large proportion of the Negroes of Dallas County met the statutory requirements of jury service."

In the case at bar, it can likewise be said that when Plaintiffs presented themselves for upgrading, if it were a matter of qualifications exclusively, the Defendants had every opportunity to prove that this fact alone made Plaintiffs ineligible for upgrading.

In *James Avery, Petitioner v. State of Georgia*, 345 U.S. (1953) it is said:

> "And in view of the case before us, where not a single Negro was selected to serve on a panel of sixty—though many were available—we think that Petitioner has certainly established a prima facie case of discrimination.
>
> "The Court below affirmed, however, because Petitioner had failed to prove some particular act of discrimination by some particular officer responsible for the selection of the jury; and the State now argues that it is Petitioner's burden to fill this 'factual vacuum.' We cannot agree. If there is a 'vacuum' to fill it is one which the State must fill, by moving in with sufficient evidence to dispel the prima facie case of discrimination . . . When a prima facie case of discrimination is presented, the burden falls, forthwith, upon the state to overcome it. The state failed to meet this test."

Of course, in the case at bar the Plaintiffs went further to prove racial discrimination by proving particular acts of omission and commission of particular agents of both defendants which, under this test, surely go beyond the establishment of the prima facie case outlined above. *Pete Hernandez, Petitioner v. State of Texas* 347 U.S. 475 (1954) also applied this "rule of exclusion" in the selection of jurors to one of Mexican ancestry.

Other cases deciding that racial discrimination in systematic exclusion of Negroes from juries is a denial of equal protection, are—*Amos Reece, Petitioner v. State of Georgia,* 350 U.S. 85 (1956); *United States of America ex rel. Robert Lee Goldsby v. William Harpole, Superintendent etc.* 263 F.2d 71 (5th Cir. 1959)—"We cannot assume that Negroes, the majority class in Carroll County, had en masse, or in any substantial numbers, voluntarily abstained from registering as electors and, by such action, had rendered themselves ineligible for jury duty."; *United States of America ex rel Seals v. Martin J. Wiman, Warden,* 304 F.2d 53 (5th Cir. 1962).

CONCLUSION

In the employment relation, true, the employee must exercise some initiative and perhaps actually seek the job. This is more likely true than not. Whereas, in the jury selection situations the population awaits selection and ordinarily the excluded juror is not the one who urges the deprivation of the equal protection of the laws. But these minor distinctions aside, it would seem the jury selection cases offer the clearest analogy to the situation presented here where the Plaintiffs were systematically excluded from

participation in the upgrading practice. Defendants make no issue that seniority was a serious determinative issue. They make the argument, however, that qualifications during the 12 year period impeded the Plaintiffs in their upgrading. Though they make no showing that Negro employees "failed" to qualify after presenting themselves for upgrading. Under this Court's authorities just discussed, it would seem defendants have some burden in this regard which they have not met.

It is therefore respectfully requested that a writ of certiorari issue to review the decision of the United States Court of Appeals, Fifth Circuit.

Respectfully submitted,

ROBERSON L. KING
Attorney for Petitioners

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21293

LEROY COOKS, ET AL., *Appellants*

v.

BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, LOCAL NO. 991 AND LOCAL NO. 783 AND THE TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Appellees*

Appeal from the United States District Court for the Southern District of Texas

---

(October 19, 1964.)

Before WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

PER CURIAM: The appellants (plaintiffs), a group of twenty-nine employees, sued The Texas and New Orleans Railroad Company (defendant) and Brotherhood of Railway Carmen of America, Local No. 991 and Local

No. 783 (defendants) claiming discrimination against them on account of race with respect to certain rights or opportunities of promotion in their employment. The evidence was fully developed and the trial court made findings of fact and reached conclusions of law contrary to the contentions of the plaintiffs.

It is our conclusion that the evidence supports the facts found, and the legal conclusions reached are correct. The record fails to disclose error.

The judgment is AFFIRMED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21293

LEROY COOKS, ET AL., *Appellants*,

v.

BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, LOCAL NO. 991 AND LOCAL NO. 783 AND THE TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Appellees*.

Appeal from the United States District Court for the Southern District of Texas

---

(December 4, 1964)

ON PETITION FOR REHEARING

Before WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

PER CURIAM: It is ordered that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21293

D. C. Docket No. 12329 — C.A.

LEROY COOKS, ET AL., *Appellants*,

v.

BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, LOCAL NO. 991 AND LOCAL NO. 783 AND THE TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Appellees*.

Appeal from the United States District Court for the Southern District of Texas

---

Before WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants Leroy Cooks, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

October 19, 1964

Issued as Mandate: December 14, 1964

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BRIEF OF THE TEXAS AND NEW ORLEANS RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Brotherhood of Railway Carmen of America, Local No. 991 and Local No. 783 and The Texas and New Orleans Railroad Company,

Respondents.

BRIEF OF THE TEXAS AND NEW ORLEANS RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

1. Will the Supreme Court redetermine facts found by the District Court pursuant to trial, and concurred in by the Court of Appeals?

STATEMENT OF THE CASE

This is a racial discrimination case under the Railway Labor Act.

The suit was filed October 2, 1958, by 29 Negro employees and former employees of The Texas and New Orleans Railroad Company in its facilities at Houston, Texas. The

trial complaint invoked federal jurisdiction under 28 U.S.C., Section 1331, the Fifth Amendment, and the Railway Labor Act. 45 U.S.C., Sections 151 et seq. (Tr. 289-290). Plaintiffs sued both their representative Union and employer Railroad Company praying for injunctive relief, establishment of seniority rights, for compensatory damages and for punitive damages against the Union (Tr. 304-306). Plaintiffs charged the defendant Union with failing to represent them without discrimination on account of their Negro race, and complain of the defendant Railroad Company for its alleged refusal to recognize some contract seniority rights to which plaintiffs claim they were entitled (Tr. 295, 299). The gravamen of the trial complaint was that defendants concealed from plaintiffs the existence of certain promotional rights to which they were entitled under the collective bargaining contracts between the Union and the Railroad, commencing with that of March 1, 1943, resulting in the deprivation of such rights, all because of plaintiffs' Negro race (Tr. 295-296, 298).[1] The complaint admits knowledge in plaintiffs of the contract rights, and cessation of any alleged discriminatory practices in 1955-1957 (Tr. 299-300).

The case remained dormant on the docket until November, 1962, when trial to the court was had, at which all parties produced evidence and were heard. The District Court entered judgment for defendants on November 1,

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[1] But for passing statement, (Appellants' Brief, page 3; Petition for Certiorari, page 6), concealment went out of the case on appeal, doubtless because the District Court's finding that defendants "made reasonable efforts to inform plaintiffs of their rights", (Tr. 412), was supported by candid admission of two witnesses for plaintiffs, (Tr. 184-185, 208-212) as well as the uncontradicted testimony of two witnesses for defendants (Tr. 238-262, 282-285).

1963, (Tr. 417), upon findings of fact and conclusions of law filed November 27, 1963 (Tr. 404).[2]

The Court of Appeals affirmed, holding that "the evidence was fully developed and the trial court made findings of fact and reached conclusions of law contrary to the contentions of plaintiffs", and concluding "that the evidence supports the facts found, and the legal conclusions reached are correct." (Petition for Certiorari, pages 17-18).

Petitioners nevertheless seek a writ of certiorari.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

1. The Supreme Court Will Not Review The Fact Findings Below.

While the granting of certiorari is, of course, discretionary, the Supreme Court ordinarily refuses to review evidence or discuss specific findings of fact. *United States* v. *Johnston*, 268 U.S. 220, 227; *General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 178; *NLRB* v. *Waterman SS Co.*, 309 U.S. 206, 208. A corollary is the "two court" doctrine, which militates strongly against reviewing evidence when findings of fact have been concurred in by the two courts below. *Corn Products Ref. Co.* v. *CIR*, 350 U.S. 46, 51; *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214; *United States* v. *Dickinson*, 331 U.S. 745, 751; Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland Ed., 1951), Article 333. It may be said that the Supreme Court reviews fact findings only in situations where the lower court has taken the case

[2] Trial was pursuant to an agreed stipulation and order of severance, reserving defensive issues of laches and limitations, etc., but full opportunity to be heard on all plaintiffs' issues was had. Propriety of the severed trial is conceded. (Tr. 3; see Brief of Appellants in Court of Appeals, page 3).

away from the jury for judicial determination. Cf. *Maynard* v. *Durham & S. R. Co.*, 365 U.S. 160; *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325; *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500. Under these authorities, the facts as found by the District Court and affirmed by the Court of Appeals, after its review of the evidence, must stand.

Discrimination is a matter of intent or purpose. *Teamsters Local* v. *Labor Board*, 365 U.S. 667; *Swain* v. *Alabama*, No. 64, October Term, 1964, 25 U.S. Supreme Court Bulletin No. 14, p. 997, March 8, 1965. Accordingly, the existence of unlawful discrimination such as that charged to the Railroad-employer here essentially requires proof that it denied plaintiffs certain contract rights, and in so doing it was motivated by an unlawful intent to discriminate on account of race. Discrimination is, therefore, fundamentally a question of fact,[3] and the determination of such fact issue by the Courts below is conclusive here.

It is to be recalled that this is an action by Railway employees for alleged deprivation of promotional rights under a collective bargaining agreement, in violation of statutory obligations placed on the representative Union and the employer Railroad by the Railway Labor Act. *This is not a civil rights case!* The only duty not to discriminate on account of race that is pertinent here is the statutory duty declared by the Court to exist by virtue

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[3] As in cases of anti-union discrimination under the Laoor Management Relations Act, 1947, the courts uniformly review decisions of the National Labor Relations Board under the substantial evidence standard for review of questions of fact. *Labor Board* v. *Walton Mfg. Co.*, 369 U.S. 404; *Labor Board* v. *Pittsburgh SS Co.*, 340 U.S. 498; *Labor Board* v. *Waterman SS Co.*, 309 U.S. 206; *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474.

of the Railway Labor Act. *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210.[4] This duty rests upon a union because of the exclusive representative right and duty as to employees vested in it by the Act. An employer-carrier also has some statutory duty not to racially discriminate, say the courts, but the employer's duty derives from the collective bargaining relationship with the union and not directly from the Act. *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 203-204; Cf. *Richardson* v. *T&NO RR Co.*, 242 F. 2d 648 (5th Circuit); *Central of Georgia Railway Co.* v. *Jones*, 229 F. 2d 648 (5th Circuit). The employer can therefore be guilty of racial discrimination in violation of the Railway Labor Act only by participating in collective bargaining with a representative union so as to discriminate, on account of race, against employees or potential employees in the particular bargaining unit. To be specific, this suit charges this Railroad-employer with discriminatory deprivation of contract promotional rights as to the complaining Negro employees. At least two fact issues are necessarily involved to establish such a case, *viz:* (a) were the complainants *in fact* denied promotions to which they were entitled under the collective bargaining contract, and (b) were such denials *in fact* motivated by the prohibited intent to discriminate against the complainants because of their Negro race? *Both* of these issues *of fact* have been determined against complainants by the two courts below, upon ample evidence adduced at a full trial.

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[4] Despite reference to the Fifth Amendment in the Trial Complaint (Tr. 290), and to the Fifth and Fourteenth Amendments in the Petition for Certiorari, (pages 5, 10-14), no constitutional right is involved in this case.

2. The findings and conclusions of the District Court, affirmed by the Court of Appeals, are amply supported by the record and are correct.

The petition for certiorari devotes less than one printed page to a discussion of the proof of alleged discrimination (Petition, page 9). Plaintiffs Taylor, Nichols and Glass, and plaintiffs' witness Altman testified in establishing plaintiffs' case (Tr. 7-227). This testimony and the exhibits incident thereto, taken alone and viewed most favorably, could establish no more than this:

Glass, Nichols and Taylor were employed in the Houston terminal as helpers, from 1940 to 1955, when they were promoted to the carman or inspector classification (Tr. 7, 88, 143). During 1943-1955 no Negroes were so promoted at the terminal, though Negroes were so promoted at the shop, another department of the Railroad in Houston under the same management (Tr. 21, 92, 148). Employees at the shop were represented by the same local union (Tr. 36). Glass, Nichols and Taylor, aware of a contractual right to promotion insofar as seniority was concerned, questioned a foreman named Miller in 1943 or 1944 about the possibility of promotion, and were told by him that Negroes were not used as carmen-inspectors (Tr. 27-28, 93, 150). Each of these plaintiffs admitted that no other person with the Railroad ever expressed such an attitude (Tr. 81, 138, 183), and Altman confirmed this fact (Tr. 222). Plaintiffs knew that Negroes were promoted in similar categories during this time (Tr. 35-36). They mentioned the Miller remark to their union steward Fontenet, a Negro, who said he would do something about it (Tr. 28, 94, 150). Despite the contract provisions for grievance processing, no grievance for any plaintiff was ever processed (Tr. 175), if indeed any were ever filed with Fontenet (Tr. 136). None of the

plaintiffs did anything further until they joined in the petition filed in this suit in 1958 (Tr. 32, 95, 153). Though each knew Mr. Wolff, the Union general chairman, and saw him frequently, none of the plaintiffs ever took the subject up with him (Tr. 30, 126, 165), nor did they ever attempt to go above Miller with the Company (Tr. 32, 78, 138-139, 153, 187).

The agreement between the Company and the Union provided for promotion of carmen helpers to carmen-inspectors on a basis of ability and seniority (Tr. 346-350), and familiarity with inspection rules of The American Association of Railroads and Regulations of the Interstate Commerce Commission were required (Tr. 407).

But despite advice by their General Chairman (Tr. 256) and steward Fontenet (Tr. 167, 237) none of the plaintiffs attempted to establish their qualifications. None bid on an inspectors job opening, though urged by Fontenet to do so (Tr. 34, 136, 162).

Much of plaintiffs' proof dealt with the claim of concealment. Glass and Nichols did not recall, or deny seeing the 1943 contract, notices to bid or qualify for higher jobs, etc. (Tr. 13, 75, 90, 139), but Taylor admitted seeing the 1943 contract (Tr. 144), and disclaimed any concealment (Tr. 184-185). Plaintiffs' witness Altman dispelled any claim of concealment, directly refuting an implication by Nichols and Glass that copies of the contracts were given only to white employees (Tr. 205, 206, 208). Plaintiffs admitted that they could not know what Company management higher than Miller would have done with a grievance processed to its attention (Tr. 78, 139, 187).

This does not make out even a prima facie case in support of the complaint.

The evidence of the defendant Union and Company then establishes this:

There was no concealment (Tr. 184, 238-262, 282-285). Copies of all contracts, notices of promotion procedures and of job openings were made available to white and colored employees alike (Tr. 205, 208, 210, 213, 245). Seniority alone would not entitle an employee to a promotion to carman-inspector, but qualifications including examination on A.A.R. rules was required until 1955 (Tr. 195, 248-250). These requirements were neither unreasonable nor discriminatory (Tr. 415). Chairman Wolff and Fontenet made these requirements known to all employees, and particularly Negro helpers, in the usual manner (Tr. 256-257). Fontenet never told Wolff or anyone with Railroad management of any complaint that Negroes were being discriminated against in the terminal (Tr. 284). No plaintiff ever bid on an inspector's job, though many openings were filled between 1943 and 1955 (Tr. 34). No grievances were ever presented to Wolff or to the Company (Tr. 175). It was not the Company's policy to discriminate on account of race during 1943-1955 (Tr. 285), and Negroes were promoted to carmen-inspector regularly during that period in shops (Tr. 35-36).[5] Had any grievance reached responsible Company management above Miller, any racial discrimination would have been eliminated (Tr. 285). None with management were aware of any attitude of Miller attributed to him by plaintiffs (Tr. 284, 222).

None of the plaintiffs studied the A.A.R. rules (Tr. 233-238), or attempted to report for the examination required for promotion (Tr. 274). These people simply made no

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[5] Between March 1, 1943, and June 13, 1955, a total of 338 carmen helpers were promoted to journeymen by the Railroad, 163 of whom were Negroes (Tr. 357-371).

reasonable effort to get themselves promoted (Tr. 256-257, 262-263).

This record amply supports the findings of fact of the District Court, as affirmed by the Court of Appeals.

3. The Jury Selection Cases Cited in the Petition are Inapposite.

In the Petition for Certiorari, admitting that in cases involving "the employment relations * * * the employee must exercise some initiative and perhaps actually seek the job", plaintiffs invoke the cited jury selection cases by way of "clearest analogy" as determinative here. They say that the record in this case establishes that plaintiffs "were systematically excluded from participation in the upgrading practice", and urge that this is dispositive of the suit.[6]

The jury selection cases cited in this respect are totally inapposite here. The law of these cases is that intentional exclusion of Negroes, or any identifiable group, from juries by state or federal government is a denial of equal protection of the law, guaranteed to persons tried by juries so selected by the Fifth and Fourteenth Amendments. *Smith* v. *Texas*, 311 U.S. 128; *Boling* v. *Sharp*, 349 U.S. 497; *Cassell* v. *Texas*, 339 U.S. 282; and the other cases cited in the Petition. But purposeful discrimination may not be assumed or merely asserted. *Brownfield* v. *South Carolina*, 189 U.S. 426; *Smith* v. *Mississippi*, 162 U.S. 592. It must be proven, *Tarrance* v. *Florida*, 188 U.S. 519; *Martin* v. *Texas*, 200 U.S. 316, the quantum of proof being a matter of federal law. *Norris* v. *Alabama*, 294 U.S. 587;

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[6] Petitioners imply that defendants have not shown that plaintiffs were not qualified "after presenting themselves for upgrading". (Petition p. 15). This is precisely what plaintiffs never did in accordance with the clear demands of the contract.

Smith v. *Texas*, 311 U.S. 128. Where there is no total exclusion of a racial group from either grand or petit juries, as in *Norris* v. *Alabama*, *supra*, *Hill* v. *Texas*, 316 U.S. 400, or token inclusion, as in *Thomas* v. *Texas*, 212 U.S. 278; *Avery* v. *Georgia*, 345 U.S. 559, a prima facie case of invidious discrimination under the Fourteenth Amendment is not made out by a showing that no Negroes served a petit jury for years. *Swain* v. *Alabama*, No. 64, October Term, 1964; 25 U.S. Supreme Court Bulletin No. 14, p. 997, March 8, 1965.

In *Swain* v. *Alabama*, *supra*, this Court holds that total exclusion of Negroes from juries over an extended period of time makes, at best, only a prima facie case of purposeful discrimination on account of race; "a fair inference of discrimination * * * which is determinative *absent sufficient rebuttal evidence*", (emphasis added). But, as in *Swain*, such a history of exclusion may be the result of other and perfectly legitimate factors, such as the operation of the peremptory challenge system, and those asserting discrimination in the operation of this system must prove it.

So, in the case at bar, the promotion of all employees is governed by the operation of a collective bargaining relationship and contract. It is asserted by plaintiffs that the defendants applied the contract in a discriminatory manner by denying plaintiffs promotional rights solely because of race. Defendants deny this and the record is replete with proof of other factors that bear on the matter, principal of which was failure of plaintiffs to establish their qualifications, or even to make application for promotion according to the uniformly applied requirements of the contract. Plaintiffs cannot prove their case now by pointing solely to proof that no Negro in the terminal was promoted to inspector between 1943 and 1955. Even the jury selection cases will not support such an argument.

The record in this case demonstrates a rather typical employment situation governed by the Railway Labor Act. A union has exclusive representation rights of a group of employees of a railroad employer, and these two enter into a non-discriminatory collective bargaining contract covering such employees. Promotion, demotion and layoff situations are subject to a usual contract procedure, in which job openings must be filled on the basis of seniority *and* qualification to perform the job. Time limits usually exist, and a non-bidding or non-qualifying employee is foreclosed from complaining if another and junior man is selected — and it is patent that no seniority system could operate otherwise. Chaos would result if employees were permitted to stand by inactive for years and then urge denial of a promotional right on any ground, including racial discrimination. Seniority rights which have vested in scores of other moves would be disrupted, and job security would be impaired.[7] The collective agreement contains a grievance procedure specifically designed for processing of a complaint by any employee that he has been deprived of a right under the contract. Time limits exist here too, else the collective bargaining device would result in complete disorder. Any employee claiming denial of a contract right must present a grievance, usually through his union representative, and this is then processed through various steps, through the higher echelons of both unions and management, to ultimate determination by the Adjustment Board.[8] Failure to timely file and process a grievance is determinative of it; and surely so as to the employer, even if a union representative were

[7] It is for this reason that the answers of both defendants in the trial court urge that all other employees in the same unit with plaintiffs are necessary parties to a suit like this (Tr. 310, 321).

[8] Failure to exhaust this remedy is also raised as a defense (Tr. 317, 321).

at fault in not presenting a grievance lodged with him by an employee.

In order to invoke even their own conception of the law of the jury selection cases, plaintiffs must show that they "presented themselves for upgrading" (Petition p. 13). The only way this could have been done under the contract was to qualify for promotion, but this plaintiffs refused to do for reasons of their own. This employer cannot now be charged with having denied promotion to a person who never presented himself for promotion.

The plaintiffs have not proved their case, and the District Court and Court of Appeals correctly so found.

CONCLUSION

The judgments below should be sustained, and the petition for writ of certiorari denied.

Respectfully submitted,

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Hugh M. Patterson

CERTIFICATE OF SERVICE

This is to certify that on the ..... day of March, 1965, a true and correct copy of this Brief was served on Mr. Roberson L. King, 1013 Calico Building, Houston, Texas, by placing the same in the United States mails, properly addressed, postage prepaid, certified mail.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1964

No. 943

I.EROY COOKS, et al.,

Petitioners

vs.

BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, LOCAL No. 991 AND LOCAL No. 783 AND THE TEXAS AND NEW ORLEANS RAILROAD COMPANY,

Respondents

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, LOCAL No. 991 AND LOCAL No. 783

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QUESTION PRESENTED

Did petitioners prove at the trial below that they were discriminated against with respect to promotions because they were Negroes?

STATEMENT OF THE CASE

The description of the action in the petition is somewhat misleading in that attention is focused on the allegations contained in the complaint rather than on the evidence adduced at trial and the findings and conclusions of the District Court. The complaint alleged that illegal racial

discrimination was practiced against Negroes at the Houston Terminal with respect to promotions from carman helper to temporary car inspector during a twelve year period, i.e.: from March 1, 1943 to June 13, 1955. These allegations were not substantiated at trial, however.

The disputed promotional rights were established in a Memorandum of Agreement effective March 1, 1943, negotiated by the Texas and New Orleans Railroad Company (Railroad) and Brotherhood Railway Carmen of America (Brotherhood), the statutory representative of Railroad's employees situated in the craft or class of carmen. (Plaintiffs' Ex. #3, R. 346-350). It provided that when neither journeymen carmen nor apprentices were available, qualified carmen helpers could be promoted (upgraded) to newly created positions of temporary carmen mechanics. Carmen helpers were to be selected for such promotions on the basis of ability and seniority.

Petitioners were employed as carmen helpers at Railroad's Houston Terminal, at which point the journeymen carmen were assigned as car inspectors. (R. 225). Car inspectors, as distinguished from other types of carmen mechanics (journeymen), were required to be familiar with a number of inspection rules promulgated by the Association of American Railroads as well as the Safety Appliance Laws and Regulations of the Bureau of Explosives of the Interstate Commerce Commission. (R. 407). Carmen assigned as car inspectors were examined periodically by Railroad on these rules and laws. (R. 199-200).

Railroad, with the express or tacit concurrence of the Brotherhood, required initially that carmen helpers who wanted to be set up to temporary car inspectors pursuant to the upgrading Memorandum of Agreement had to learn these various rules and laws, inasmuch as they would per-

form the same duties as the journeymen car inspectors. At first, written tests were given to ascertain whether helpers were conversant with them; thereafter oral examinations were given. (R. 354). The above described requirement for promotion to temporary car inspector positions which was neither unreasonable nor discriminatory (R. 415) continued in effect until 1955, when an acute shortage of helpers who could qualify for promotion developed. Railroad then reduced the standards, and required merely that helpers be able to read and write and be familiar with the tools used in the carmen's craft or class. (R. 355). Petitioners were promoted to temporary car inspectors after the qualifications were changed, commencing on June 13, 1955.

Between March 1, 1943, and June 13, 1955, however, 338 carmen helpers were promoted to positions as temporary journeymen throughout Railroad's system, of whom 163 were Negroes. (R. 357-371). Some of the Negro carmen helpers promoted throughout this period were employed at Railroad's Houston General Shops and were members of the same local lodge of the Brotherhood as petitioners, respondent Local Lodge No. 991 (R. 129, 171). The only journeymen positions to which Negroes were not upgraded at Houston were the positions of car inspectors.

Shortly after the upgrading Memorandum of Agreement became effective, Railroad's car foreman at the Houston Terminal, H. B. Miller, told three of the petitioners that the temporary car inspector positions were for White employees. (R. 27-28, 93-94, 149-150). However, in 1948 and 1949, Miller notified all carmen helpers that in order to qualify for promotion to temporary car inspectors they would have to pass car inspector's examinations. (Defendant's Ex. #4, #5, R. 216, 245-246, 350-351). In a 1949 bulletin posted in both the White and Negro locker rooms he specifically invited all helpers interested in promotion

to come to his office to "write up the examination." None of the petitioners responded to these bulletins.

The fact that carmen helpers could not be upgraded to temporary car inspectors unless they became conversant with the normal car inspection rules and requirements was a matter of common knowledge throughout the period of time covered by the complaint. Brotherhood's General Chairman, E. C. Wolff, in the latter part of 1943 and 1944, prepared over two thousand copies of a typical car inspector's examination, containing the questions and answers thereto, and sent them to the various affiliated local lodges of the Brotherhood on the Railroad. (R. 251). Seventy-five copies were sent to Local Lodge 991 in Houston, Texas. Subsequently, the local chairman, the late Earl Fontenett, who was a Negro, requested and received seventy-five more, (R. 251-252), because he had some helpers who wanted to "study up" on the examination. Fontenett advised his members, including some of the petitioners (R. 167-168, 237-238), that they would have to establish their qualifications for temporary car inspector positions, and at one meeting of Local Lodge 991, he chided the members for not attempting to learn the applicable rules and regulations. He told them that he doubted whether any of them were qualified to be set up as temporary car inspectors. (R. 233-235).

In 1950, General Chairman Wolff by letter, and later in an address to the membership of Local Lodge 991, discussed the right of Negro carmen helpers to be promoted to temporary car inspectors (R. 256-257). Wolff assured the members that they could be promoted but warned that promotions were not based on seniority alone. He said that carmen helpers would have to learn the rules and regulations for car inspectors and be able to stand a written examination on them. Petitioners still failed to apply for

promotion and made no attempt to establish their qualifications for temporary car inspector positions.

The District Court, after hearing the evidence, entered comprehensive findings of fact and conclusions of law (R. 405-416). Among other things the Court found that petitioners, at least from 1948 onward, failed to make reasonable efforts to get themselves promoted and also failed to establish that they possessed the technical ability required for promotion to positions of temporary car inspectors pursuant to the standards imposed by Railroad during the years 1943 to 1955.

ARGUMENT

The record has been summarized in some detail to show that the District Court's findings of fact, which are of critical importance, were amply supported by evidence adduced at trial. Petitioners attempted to prove that the Negro carmen helpers at the Houston Terminal were ignored or passed over for promotion to temporary car inspectors while White carmen helpers were sought out and offered such positions irrespective of their qualifications for the work. The District Court found that this was not the case but, rather, that carmen helpers, Negro or White, had to apply for the upgraded positions and establish their qualifications for them by taking and passing an examination on the rules and laws pertaining to car inspection. Petitioners failed repeatedly to take advantage of the opportunity to establish their qualifications for upgrading and, thus, created the condition to which they now point as evidence of discrimination.

The District Court's findings of fact were approved by the Court of Appeals. Pursuant to the so-called "Two Court Rule," they should be binding upon the petitioners.

unless clear error can be shown, *Comstock v. Institutional Investors*, 335 U.S. 211, 214 (1948); *Faulkner v. Gibbs*, 338 U.S. 267, 268 (1949). Since petitioners have not taken specific exception to any of the District Court's findings, it is assumed they are not disputed.

Petitioners' attack on the judgment of the District Court appears to be based on a premise that proof that no Negroes were promoted at the Houston Terminal for a period of twelve years established a case of discrimination *per se*, rather than on the weight of the evidence. The several 14th Amendment jury-exclusion cases cited by petitioners in support of this premise do not establish any such *per se* rule, however.

The jury-exclusion cases, such as *James Avery v. State of Georgia*, 345 U.S. 559 (1953) and *Smith v. Texas*, 311 U.S. 128 (1940), stand for the more limited proposition that proof of systematic exclusion of Negroes from grand or petit juries establishes a prima facie case of illegal discrimination. Even if it is assumed that the evidentiary rule of those cases is applicable, and that petitioners made out a prima facie case of discrimination, the prima facie case was overcome by persuasive evidence elicited from petitioners' own witnesses on cross-examination, from respondents' witnesses, and from documentary evidence introduced at trial. The rebutting evidence indicated that while petitioners wanted to be upgraded, they did not want to meet the requirements imposed for upgrading. They were, in short, seeking promotional rights in excess of those to which they were entitled at the time under the provisions of the upgrading Memorandum of Agreement.

The Railway Labor Act cases cited by petitioners, *Steele v. Louisville and Nashville R. Co.*, 325 U.S. 192 (1944) and *Conley v. Gibson*, 355 U.S. 41 (1957) hold that a statutory

bargaining representative such as Brotherhood is impressed with a statutory duty to represent all members of the craft or class fairly and without hostile discrimination against any members of a minority group thereof. Such duty is acknowledged, and petitioners did not prove that it was violated.

CONCLUSION

It is clear that no novel or important question is raised in the petition. The judgment below was based upon findings of fact supported by the evidence adduced at trial and valid inferences and conclusions drawn therefrom. It is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that copies of the foregoing brief in opposition for respondent Brotherhood of Railway Carmen of America, Local No. 991 and Local No. 783, have been served on the opposite parties by depositing copies of same in the United States Mail with First Class Postage Pre paid, addressed to counsel for the said opposite parties, this 29th day of March, 1965.

Donald W. Fisher